UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST SAINT LOUIS DIVISION

IN RE:

TAMARA A. MURPHY, Case No. 01-34573

Debtor

ORDER ON TOYOTA MOTOR CREDIT CORPORATION'S APPLICATION FOR PAYMENT OF ADMINISTRATIVE EXPENSES AND THE CHAPTER 13 TRUSTEE'S OBJECTION THERETO

This matter comes before the Court on Toyota Motor Credit Corporation's ("Toyota") Application for Payment of Administrative Expenses (the "Application") and on the Chapter 13 Trustee's Objection thereto. Following a hearing, the Court took the matter under advisement and now issues the following Order, wherein it finds that Toyota is not precluded from recovering an administrative expense claim under 11 U.S.C. § 503(b)(1)(A); however, the Court finds that it needs to hear additional evidence regarding Toyota's claim and will accordingly schedule another hearing in this matter.

Debtor Tamara A. Murphy ("Debtor) commenced this case under Chapter 13 of the United States Bankruptcy Code (the "Code") on December 21, 200 1. The Debtor's original plan, filed along with the petition, provided for the assumption of her lease with Toyota of a 2002 Camry (the Lease"), with monthly payments to be paid "outside the plan." This plan, however, was never confirmed. Eventually, the Debtor filed four amended plans, each of which indicated that she intended to reject the Lease. The amended plans further indicated that the Debtor would surrender the Camry to Toyota. While the Debtor's first, second, third and fourth amended plans drew various unrelated objections by the Trustee, Toyota did not object to any of these plans, and the Debtor's Fourth Amended Plan was confirmed by the Court on April 3,

2002.

The Debtor made no payments to Toyota for her use of the car following the commencement of the case. On April 24, 2002, Toyota filed its Application, seeking the payment of $2,577.29 in unpaid post-petition lease payments and accrued late fees as an administrative expense. In its Application, Toyota argues that by virtue of the Debtor's original plan, she initially assumed the Lease and should therefore be required to pay any post-petition payments as an administrative expense even though the Lease was later rejected. In its supporting brief, however, Toyota primarily argues that because the Debtor retained and benefitted from the vehicle post-petition, she should be required, pursuant to Code §§ 503(b)(1)(A) and 507, to compensate Toyota by way of an administrative expense payment. The Court will discuss each argument in turn.

Under Section 365(a), the trustee (or debtor-in-possession) may assume or reject any executory contract or unexpired lease of the debtor. If an unexpired lease is rejected and there has been no prior assumption, a breach of the lease is deemed to have occurred immediately before the date of the filing of the petition, which then gives rise to a pre-petition claim for damages against the debtor. 11 U.S.C. § 365(g)(1). If, on the other hand, an unexpired lease is first assumed and later rejected, such rejection is construed as a breach of the lease as of the date of the rejection. In such instances, a lessor has an administrative claim for the debtor's post-petition, pre-rejection use of the property. *See* 11 U.S.C. § 365(g)(2); *In re Pearson*, 90 B.R. 638, 639-42 (Bankr. D.N.J. 1988); *In re Scott*, 209 B.R. 777, 781 (Bankr. S.D.Ga. 1997).

The position advocated by Toyota in its Application appears to be based on the mistaken

conclusion that the Debtor in this case assumed the Lease by virtue of her original plan.[1] Contrary to Toyota's argument, the Debtor did not assume the Lease because the only plan that actually provided for the Lease's assumption was never confirmed by the Court. *See Scott*, 209 B.R. at 781 (assumption of unexpired lease can only be accomplished through express court order); *see also* 11 U.S.C. § 365(a) (the power to assume an unexpired lease is "subject to the court's approval"). Although the Debtor initially intended to assume the Lease through her original plan, because that plan was not confirmed, no assumption occurred that would support Toyota's administrative expense claim.

In contrast to the argument presented in its Application, Toyota maintains in its supporting brief that its administrative claim should be granted, notwithstanding the import of § 365(g), pursuant to Code § 503(b)(1)(A). Under that section, the "actual, necessary costs and expenses of preserving the estate" shall be paid as an administrative expense. In the Chapter 11 context, courts have allowed a lessor to be paid an administrative claim under § 503(b)(1)(A) notwithstanding the limitations set forth in § 365. For instance, several courts have concluded that amounts which become due during the first sixty days of a Chapter 11 case under a personal property lease, while not entitled to be paid as an administrative expense claim under § 365(d)(10), maybe entitled to such priority under § 503(b)(1)(A). *See, e.g., In re Furley's Transport, Inc.*, 263 B.R. 733 (Bankr.D.Md.2001); *In re Magnolia Gas Co.*, 255 B.R. 900 (W.D.Okl.2000); *In re PanAm Airways Corp.*, 245 B.R. 897, 899 (Bankr.S.D.Fla.2000). This is true even if the lease is never assumed, the theory being that a debtor-in-possession who uses property during the post-petition period

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[1]In Paragraph 7 of the Application, Toyota asserts, "Debtor assumed the Lease pursuant to 11 U.S.C. § 365 and therefore [Toyota] is entitled to an Administrative Expense Claim for any cure amounts under the Lease plus any lease payments that came due post-Petition up to the date of Debtor's surrender of the vehicle on April 9, 2002."

may have to compensate the lessor for such use if it benefits the estate as a whole. *In re Raymond Cossette Trucking, Inc.*, 231 B.R. 80, 84-85 (Bankr.D.N.D. 1999). As stated in *Raymond Cossette:*

> Typically, a rejection of a pre-petition contract or lease will result in a breach as of petition filing and give rise to nothing more than an unsecured claim for damages *assuming the debtor-in-possession has not used the property to its benefit*. . . . If, however, the debtor-in-possession does more with the property than merely retain possession and garners benefit for that retention, then section 503(b)(1)(A) comes into play irrespective of whether damages for breach might otherwise lie.

Id. at 84 (citations omitted).

This Court has been unable to locate any Chapter 13 case which specifically allowed an administrative expense claim under § 503(b)(1)(A) even though the subject lease was never assumed by the debtor-in-possession. The bankruptcy court in *Scott* recognized that such a claim is theoretically possible, assuming that the claimant proves that it was "an actual and necessary cost of preserving the estate." This Court agrees that such claims are theoretically possible under Chapter 13 and may succeed if the proper showing is made. But what is the proper showing in this context? With respect to claims filed in Chapter 11 cases, the Seventh Circuit has adopted a two prong test for determining whether the claim is entitled to administrative priority under § 503(b)(1)(A). *In re Jartran*, 732 F.2d 584, 586 (7th Cir. 1984). First, the transaction giving rise to the claim must have arisen as a result of a transaction between the creditor and the debtor's estate. According to *Jartran*, this first prong requires some form of a post-petition "inducement" by the debtor-in-possession to the creditor for the claim to receive administrative priority. *Id*. at 586-588 ("administrative priority is granted to post-petition expenses so that third parties will be moved to provide the goods and services necessary for a successful reorganization"). In other words, an administrative expense claim cannot be based on a transaction between the debtor and creditor that occurred only pre-petition. Second, the administrative claimant must prove that the transaction

conferred a benefit upon the debtor-in-possessions's estate in the post-petition operation of its business. *Id*. at 586.

Unfortunately, the *Geartrain* test is not directly analogous here. The Court agrees that in the Chapter 13 context, there must be a post-petition "transaction" between the debtor and creditor. The creditor cannot simply acquiesce to the debtor's continued use of the property and then claim an administrative expense if any post-petition amounts goes unpaid. Rather, the debtor must affirmatively induce the creditor to continue their relationship and to forego whatever rights it may have against the debtor under the subject lease or contract. However, the second prong of *Geartrain* has limited utility in the Chapter 13 context. As aptly noted in Scott:

> Terms of the Bankruptcy Code must have utility from one chapter to another. Yet, the nature of debtors as between the chapters varies. A corporate debtor may exist for the purpose of profiting from its activities. Any "necessity" as to such a debtor can be defined within the narrow terms of cost-benefit analysis. Such analysis is less useful in considering "necessity" for an individual debtor. For example, transportation may be immediately related to the production of earnings which are used to fund a reorganization plan. Housing may be less directly related to the economic enterprise unless it can be said that a debtor's day to day existence is itself an economic enterprise maintained for the benefit of creditors. So it happens that a term such as "actual and necessary" may lose its practical utility in Chapter 13 even though it is technically applicable.

The Court cannot conclude that § 503(b)(1)(A) was intended to cover all of a Chapter 13 debtor's post-petition living expenses, but instead includes only those expenses directly related to the production of the debtor's income. As such, Toyota can conceivably sustain its administrative expense claim if it can demonstrate that the Debtor used the *Camry* in the course of her employment. Based on the principles set forth in this opinion, the Court will conduct an evidentiary hearing in this matter, the scheduling of which will be set forth in a separate order.

The Court also notes the question as to when the Debtor actually surrendered the vehicle has not yet been resolved. At the first meeting of creditors, held January 24, 2002, the Debtor allegedly testified that she surrendered the vehicle by apparently delivering it to a Toyota dealership two weeks prior to the 341 meeting, approximately three weeks after commencing her Chapter 13 case. However, there is no evidence regarding the Debtor's testimony actually before the Court. Toyota has maintained, also without evidence, that it was unable to locate the vehicle on the dealer's lot until April 9, 2002. The Court will have to hear additional evidence from the parties on this issue at the next hearing on this matter.

Dated: September 19, 2002

/s/ James K. Coachys, Judge
United States Bankruptcy Court

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